No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 7, 1992
CERTIORARI GRANTED NOVEMBER 30, 1992

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[1] The following items were printed in the petition appendix and are not reprinted herein: (1) the June 9, 1992, opinion of the court of appeals upon return of record from the Federal Communications Commission; (2) the March 6, 1992, opinion of the court of appeals remanding the case to the Commission; (3) the May 5, 1992, report of the Federal Communications Commission.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC., MAXTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION AND WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., WIRELESS CABLE ASSOCIATION, INC., SOUTHWESTERN BELL CORPORATION, HUGHES COMMUNICATIONS GALAXY, INC., INTERVENORS

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
(M) 02-19-91	Petitioner's petition for review of an order of the FCC (m-19) [11]
	• • • •
(M) 02-27-91	5—Motion of BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company for leave to intervene (m-27) [11]
(M) 03-05-91	5—Motion of Spectradyne, Inc. for leave to intervene (m-5) [11]
(M) 03-18-91	5—Motion of National Cable Television Association, Inc. for leave to intervene (m-18) [11]

(M)03-19-91	5—Motion of Wireless Cable Association, Inc. for leave to intervene (m-19) [11]
(M)03-19-91	5—Motion of Southwestern Bell Corporation for leave to intervene (m-21) [11]
(M)03-19-91	5—Motion of Hughes Communications Galaxy, Inc. for leave to intervene (m-21) [11]
	* * * *
(M)03-28-91	Clerk's order granting interventions.
	* * * *
(M)04-11-91	CERTIFIED INDEX TO RECORD
	* * * *
(E)05/09/91	5—Motion of BellSouth Corporation (BellSouth Companies) to Withdraw as Intervenor. (m-09) [11]
	* * * *
(E)06/10/91	Clerk's order of BellSouth Corporation, Southern Bell Telephone, *et al.*'s Motion to withdraw as Intervenor and no opposition thereto having been received, it is ORDERED that BellSouth Corporation, Southern Bell Telephone, *et al.*'s Motion to Withdraw as Intervenor be granted, and the Clerk shall note the docket accordingly.
	* * * *
(N)12/09/91	ARGUED BEFORE: Mikva, Chief Judge and Edwards and D.H. Ginsburg, Circuit Judges. The Court granted both counsels leave to file supplemental brief, not more than 5-pages.
(M)12-16-91	5—Petitioners' motion to remand (m-16) [8]
	* * * *
(M)12-20-91	5—Respondents' opposition to petitioners' motion for remand (m-20) [8]
(Z)12-26-91	Per Curiam order that the motion to remand be denied. AJM, HTE, DHG

DATE	FILINGS—PROCEEDINGS
(cb)3-6-92	Opinion for the court filed by Circuit Judge Edwards denying petition for review in part, dismissing in part and remanding record in part for supplementation: separate concurring statement filed by Chief Judge Mikva.
(M)05-05-92	5—Respondent's report in response to opinion of 3/6/92 (m-5) [1]
(cb)6-9-92	Opinion for the Court filed Per Curiam. Chief Judge Mikva dissenting.
(cb)6-9-92	Judgment for the Court that the petition for review is granted in part (June 9, 1992), denied in part and dismissed in part (March 6, 1992), all in accordance with the Opinion for the Court filed herein this date.
(cb)6-9-92	Order delaying mandate.
(LB)07-31-92	MANDATE ISSUED.
(M)09-02-92	Letter from Clerk's Office, US Supreme Court dated 9/1/92 advising that application for extension of time within which to file petition for writ of certiorari has been presented to the Chief Justice who on 9/1/92 signed an order extending the time to and including 10/7/92. [1]
(M)10-13-92	Notice dated 10/7/92 from Clerk's Office, US Supreme Court of filing of petition for certiorari. [1]
(M)11-09-92	Copy of respondent's brief in opposition to petiton for writ of certiorari received from Beach Comm. (p-9) [11]
(M)11-24-92	Copy of respondent's supplemental brief received from Beach Comm. [on petition for writ of certiorari] (p-24) [11]

DATE	FILINGS—PROCEEDINGS
(M) 12-02-92	Certified copy of S.Ct. order granting writ of certiorari to US Ct. Appeals for DC Cir. dated 11/30/92 [1]

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 89-35

IN THE MATTER OF

DEFINITION OF A CABLE TELEVISION SYSTEM

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 11, 1990: Released: December 21, 1990

By the Commission

I. INTRODUCTION

1. The Commission issued the *Notice of Proposed Rule Making* in this proceeding [1] to clarify its interpretation of the statutory term "cable system" as defined in the Cable Communications Policy Act of 1984.[2]

2. A cable system is defined in section 602(6) of the Cable Act and in section 76.5(a) of the Commission's rules as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide

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[1] 4 FCC Rcd 2088 (1989).

[2] Pub. L. No. 98-549, 98 Stat. 2779 (1984).

> cable service which includes video programming and which is provided to multiple subscribers within a community . . .

These same sections exclude from the definition

> a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

3. In adopting rules to implement the Cable Act in 1986, the Commission had concluded, based on certain legislative history of the Act, that when multiple unit dwellings are involved, the distinction between a cable system and other types of video distribution systems rested solely on whether or not the facilities used any public right-of-way.[3] Decisions by two federal district courts, however, raised significant questions about this and other prevailing interpretations of the Act. In *City of Fargo v. Prime Time Entertainment, Inc.*,[4] the court determined that a television distribution system within a building became a cable system when it was connected by infrared transmissions with a video distribution system in a second building, because the two buildings were not commonly owned, controlled, or managed. In *Pacific & Southern Co., Inc. v. Satellite Broadcasting Networks, Inc.*,[5] the court suggested that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities could constitute a cable television system within the meaning of Section 602(6) of the Communications Act.

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[3] *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d 386, 396-97 (1986).

[4] Case No. A 3-87-47 (D.N.D. March 28, 1988) (unpublished).

[5] 694 F. Supp. 1565 (N.D. Ga. 1988).

4. To clarify these issues we sought coment on whether facilities serving multiple unit dwellings that do not use public rights-of-way might in some instances be cable systems within the Act's definition. We further sought comment on the broader implications of treating facilities connected only by radio (or infrared) transmissions and making use of no other interconnecting wires or cables as cable systems. Twenty-three parties filed comments and thirteen parties filed replies in response to the *Notice*.

II. SUMMARY OF CONCLUSIONS

5. After carefully considering these comments, we conclude that the term cable system as used in the Act encompasses only video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers and only those that use such technology outside individual buildings. Radio services that do not use such closed transmission paths at all (or if they do, systems using such technology only inside individual buildings), including direct broadcast satellites and so-called "wireless cable" (multipoint distribution service (MMDS), instructional fixed television service (ITFS), and operational fixed service (OFS) facilities), are therefore not cable systems under the Act. Satellite master antenna systems (SMATV) and master antenna systems (MATV) that use wire or cable only within the premises of a single multiple unit building are not cable systems. MATV or SMATV systems serving more than one multiple unit dwelling interconnected only by radio or infrared facilities also are not cable systems. Finally, if multiple unit dwellings are connected to each other by physically closed transmission paths, such SMATV or MATV systems are cable systems unless the buildings are under common ownership, control, or management and do not use public rights-of-way. The basis for each of these conclusions is discussed in detail below.

III. DISCUSSION

A. "Closed Transmission Path" Requirement

6. *DBS, MMDS, and Other Radiating Technologies Excluded.* In the *Notice*, we expressed our tentative view that Congress did not intend to include radio transmission services, such as DBS and MMDS, within the Act's definition of a cable system. We also expressed our concern that the referenced court decisions "could presage other possible inapt extensions of the definition [of a cable system] that would require the treatment of additional wireless video delivery systems as cable systems as well." After considering the comments directed to this issue, we conclude that our initial view was correct.

7. As indicated above, the statutory definition contains a threshold requirement that a cable system involve facilities consisting of a set of "closed transmission paths." The term closed transmisison path is not defined in the Act, and the House Report does not directly discuss the meaning of this term. However, the Senate version of the Cable Act used a very similar term—"closed transmission mediums"—in its definition of a cable system. That term was to be statutorily defined as

> media having the capacity to transmit electromagnetic signals *over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor* or device . . . .[6]

The original Senate version of the Cable Act thus made explicit that, by referring to a "closed" transmission medium, the drafters contemplated that cable system facilities would use physically closed or shielding conducting media or "transmission paths," rather than radio waves alone. While the original Senate version of the Cable Act

[6] S. 66. Section 603(11) (emphasis added). S. Rep. 98-67, 98th Cong., 1st Sess. 35 (1983).

was not passed, we have no basis for thinking that the Senate and House did not share a common understanding of the virtually identical terms "closed transmission path" and "closed transmission media" (which itself was defined as a "transmission path") that were used in their respective definitions of cable systems. Indeed, the term "cable" itself is commonly defined by dictionaries as an insulated "electrical conductor," which tracks the Senate's reference to "signal conductors" when defining cable as a closed transmission medium. In the absence of any evidence in the legislative history to the contrary, the Senate language is highly probative of the congressional intent underlying the statute's use of the term "closed transmission path" to define a cable system.

8. Our interpretation is further supported by passages in the Senate and House Reports that use virtually identical language when referring to types of video delivery systems including MATV, SMATV, MDS, DBS, and STV, that both bodies understood to be different from cable systems. The House Report, for example, stressed that

> in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of *alternative delivery systems* for these services, *such as DBS, SMATV and subscription television.* The public interest is served by this competition, and it should continue.[7]

Similarly, the Senate Report on S. 66 (the original Senate version of the Cable Act), pointed out that cable faces

[7] H.R. Rep. 98-934, 98th Cong., 2d Sess. 22-23 (1984) (emphasis added).

major competition from such services as MDS, MATV, SMATV, DBS, STV "and other media." [8]

9. In short, both bodies of Congress expressed virtually identical views concerning the types of services—DBS, MDS, and STV—that were not considered cable system. All of these services used radio waves (without physical conduction media or devices) and thus stand in sharp contrast to the "closed transmission paths" referred to in both the Senate and House versions of the Act.

10. In addition, the very structure of the Cable Act as a whole clearly contemplates a regulatory system where there is a strong nexus with individual local communities through the franchise process. Such a nexus is clearly absent, for example, in the direct broadcast satellite situation, which further suggests that inclusion of radio based video distribution systems within the cable system definition was not intended. As a number of commenting parties point out, alternative delivery systems such as MDS and DBS could not practically be regulated under the statutory scheme adopted in the Cable Act. The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve.

11. Furthermore, this interpretation of the term is consistent with the Commission's own view of the physical characteristics of cable systems, as evidenced by its decisions and rules prior to enactment of the Cable Act. While the Commission's initial 1965 definition's reliance upon "redistribut[ing] . . . signals by wire or cable . . . ." [9]

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[8] S. Rep. 98-67, 98th Cong., 1st Sess. 30 (1983).

[9] *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC 683, 741 (1965). *See also Second Report and Order in Docket 15971*, 2 FCC 2d 725, 729, 793-94 (1966), in which the Commission exercised jurisdiction over cable as "communication by wire," defined in Section 3(a) of the Act as transmissions "by aid of wire, cable, or other like connection . . . ." *Compare* Section 3(b), defining "radio communication" as "transmission by radio . . . ."

was amended in 1977 to eliminate reference to "by wire or cable," [10] the Commission specifically stated that this change was not intended to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ." [11] In enacting the Cable Act, Congress acted against a background of almost thirty years of Commission regulation in the cable area, and commenters have offered no evidence that it intended to alter in any fundamental way the basic meaning of the term "cable system" as reflected in prior Commission decisions and as applied to these alternative radio frequency using services. Absent such evidence, we shall not infer that Congress intended a definition of the term that is significantly different in these respects from the Commission's prior understanding.[12]

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[10] *First Report and Order in Docket 20561*, 63 FCC 2d 956 (19—).

[11] *Id.* at 965. The change appears to have anticipated the possibility of optical fiber transmission paths replacing traditional coaxial cable distribution plant.

[12] *Cf. City of New York v. FCC*, 486 U.S. 57 (1988). In view of our conclusions above, we reject the argument of the National Cable Television Association, Community Antenna Television Association, City of Chicago, and Association of Independent Television Stations that point-to-point radio transmission (as distinguished from point-to-multipoint) should be treated as closed transmission paths. There is no support for this position in either the Cable Act, its legislative history, or our precedents. We do not, however, suggest that cable facilities must use physically enclosed transmission path exclusively in order to retain their status as cable systems. Obviously, many cable systems utilize point-point microwave radio links in addition to wire or cable to relay programming to the cable community, to pick up programming from remote locations within the community, and to connect headends and subheadends within the area served. Use of such radio facilities clearly does not remove

12. *MATV and SMATV Systems.* As discussed above, the Cable Act's definitional reference to "closed transmission paths" requires that a video delivery system consist of some type of physically closed transmission path to subscribers, such as wire, cable, or fiber optics, before it may be deemed a cable system; transmissions by radio alone do not satisfy this criterion. "Traditional" cable systems, that are within the definition, use coaxial cable laid under city streets or along telephone or electric utility lines.[13] However, large apartment buildings also may use coaxial cable to distribute programming within the confines of a single building. Specifically, a master antenna television (MATV) system uses a single antenna to capture a radio signal off the air and deliver it to tenants in a multiple unit building using coaxial cables that run throughout the building. Similarly, a satellite master antenna (SMATV) system receives radio signals transmitted by satellite to an earth station atop a multiple unit building and distributes the signals through an MATV system within the building.

13. In the *Notice*, we requested comment on whether SMATV systems might be considered cable system and expressed the tentative view that they were not. In addressing this matter, we consider first the applicability of the definition to such operations using cables internally but connected externally by radio communications (satellite, microwave, infrared, or other non-closed communications systems) and, second, to such operations connected by external cables. As explained below, we conclude that neither MATV nor SMATV systems as such are covered by the Cable Act as cable systems, but that such facilities may become cable systems if they consist of

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what is otherwise a cable system from the coverage of the definition because the connected parts of such facilities would be independently covered by the definition.

[13] *See New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

multiple buildings interconnected by cable. Specifically, we find that SMATV or MATV buildings connected by radio communications are not cable systems because they do not use "closed transmission paths" within the meaning of the statutory definition.[14] By contrast, SMATV or MATV buildings interconnected by cable or wire will be considered cable systems, unless they fall within the private cable exemption discussed below.

14. Whether the Cable Act's definition of a "cable system" was intended to include MATV and SMATV systems can best be discerned by examining both the legislative history of the provision and Commission precedents existing at the time the Act was passed. In this regard, it is relevant that by the time the statutory language was drafted, the Commission already had exempted SMATV and MATV systems from its definition of a cable system. This exclusion was reflected both in the original definition enacted in 1965 and in the subsequent clarification enacted in 1977. Specifically, the 1965 definition excluded a facility "which serves only the residents of one or more apartment dwellings under common ownership, control or management." [15] The 1977 definition excluded a facility "that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management." [16]

15. Section 602(6) of the Cable Act contains a virtually identical exclusion in the statutory definition of a cable system.[17] Significantly, there is no evidence in the

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[14] As we explain below, this is so even though these systems use cables within individual buildings.

[15] 38 FCC at 741.

[16] 63 FCC 2d at 965.

[17] We note that the statutory definition contains a requirement that facilities within the exemption for multiple unit dwellings not use any public right-of-way, a requirement that was not included in the Commission's pre-existing defintion of a cable system. This

legislative history that Congress intended for the same words to have a different meaning than had previously been ascribed to them by the Commission.[18] We accordingly conclude that pre-existing Commission precedents should be used to determine how various types of SMATV and MATV operations should be treated under the Cable Act. As discussed more fully below, those precedents establish that the use of wire or cable solely within a building's premises did not make a SMATV or MATV operation a "cable system" for jurisdictional purposes. As a result, neither single-building SMATVs or MATVs, nor multi-building SMATVs or MATVs interconnected solely by radio communication, were deemed to be cable systems by the Commisison even when the buildings were not commonly controlled, owned, or managed.

16. The starting point in our analysis is those cases recognizing that a SMATV's or MATV's use of wire or cable only within the premises of a building is fundamentally different than use of cable as a medium of communications outside a building, both from a state and federal jurisdictional standpoint. In 1975, when interpreting its cable definition and exclusions, the Commission addressed the exemption for multiple unit dwellings by emphasizing that "there is a real and effectual difference between *a single structure that has been wired to provide antenna service* to its component residences, and an *externally wired community* of individual homes." [19]

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additional statutory requirement appears to be related mainly to Commission decisions and policies regarding its preemption of state regulation of SMATV and MATV facilities. *See* Section 621(e) of the Act and the discussion at paragraph 29 below.

[18] The legislative history does not provide precise guidance except to make clear that SMATV and MATV system generally are excluded from the definition of a cable system. *See* S. Rep. 98-67, 98th Cong., 1st Sess. 18-19 (1983); H.R. Rep. 98-934, 98th Cong., 2d Sess. 44 (1984).

[19] *Notice of Proposed Rule Making in Docket 20561*, 54 FCC 2d 824, 826 (1975) (emphasis added).

The Commission also noted its expectation that as to such internally wired buildings "[b]ecause no use is made of local rights-of-way before commencing operation." [20] As a result, such systems were not deemed to be cable systems for jurisdictional purposes.

17. In a subsequent *Report and Order*, the Commission further explained that the term "subscriber" in the cable definition "includes the occupants of one or more multiple occupancy buildings" if that "*MATV system is interconnected in a cable television system.*" [21] The Commission thus again expressed its understanding that MATV subscribers would not be "cable" subscribers unless the internal MATV system was interconnected with and part of a "cable" system. On reconsideration in that same proceeding, moreover, the Commission flatly rejected arguments that a MATV system should be considered a cable system "because it makes no regulatory difference whether a cable systems is high-rise or low-rise, detached or unattached, multi-family or otherwise." The Commission declined even to exercise jurisdiction, finding MATV "a different entity for regulatory purposes" and reiterated its view that "MATV systems [are] substantially different from traditional cable systems so as to justify continued exemption from our regulations . . . ." [22]

18. These decision made clear that the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a "cable" system. Consistent with this fundamental understanding, we have discovered no cases prior to the Cable Act in which the Commission ever treated MATV and SMATV buildings as cable systems unless

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[20] *Id.* at 835.

[21] *Report and Order in Docket 20561*, 63 FCC 2d 956, 966 (1977) (emphasis added).

[22] *Memorandum Opinion and Order in Docket 20561*, 67 FCC 2d 716, 725 (1978).

the individual buildings were interconnected to each other by wire or cable. Conversely, where MATV buildings were connected by radio alone, the Commission did not treat the facilities as cable systems, even where the buildings were not commonly-owned and thus were not within the exemption for multiple unit dwellings.

19. The *Video International Productions, Inc./Cable Dallas* cases, for example, illustrate the type of SMATV system that the Commission viewed as a cable system.[23] In those cases an applicant sought to demonstrate that it was a cable system.[24] It provided SMATV service to several groups of apartment buildings and none of the buildings was under common ownership, management, or control. Each building within a group, however, was interconnected with cable transmission lines. Although none of the buildings was commonly owned and each building was served internally by a MATV system, the Bureau and Commission decisions left no doubt that these factors alone were insufficient to bring the system within the definition of a cable system. The Bureau decision held that

> each group of buildings *interconnected with cable transmission lines* constitutes a separate cable system to which CARS service is permissible under . . . the Rules. . . . The fact that each of the apartment buildings served may own the *terminating cable pathways within its confines* is not determinative of [the applicant's] status as a cable television system. It is the *interconnection* of each separately owned

[23] *Video International Productions, Inc.*, (Cable Television Bureau, May 12, 1981); *Cable Dallas, Inc.*, (Cable Television Bureau, May 18, 1982), *review denied*, 93 FCC 2d 20 (1983).

[24] The applicant (Cable Dallas) was seeking a cable television relay service (CARS) authorization. To be eligible for a CARS radio license, it was required to own or manage and operate a cable television system. *See* 47 C.F.R. Section 78.13.

> apartment building which qualifies [the applicant] as a cable television system.[25]

In addition to making clear that the wiring within a single multiple unit dwelling did not render a SMATV system a cable system, the Bureau clearly indicated that, for a group of SMATV apartment buildings not under common ownership to be a "cable" system, the buildings must be interconnected by "cable." Indeed, the Commission's rule required that the microwave relay authorization in question could only be awarded to cable system applicants. As a practical matter, this requirement foreordained that the threshold interconnection of SMATV buildings to establish a cable system could be accomplished only by wire and not by radio links. Subsequently, in a related case involving the same system, the Commission confirmed that it was the physical interconnection of each individual building by cable that rendered the system a cable system.[26]

20. Conversely, and prior to *Cable Dallas*, the Commission had made clear that non-commonly owned MATV apartment dwellings in a system connected by a radio microwave multipoint distribution service (MDS) is not a cable system. In *Orth-O-Vision*,[27] the Commission preempted state regulation of a system serving 35, separately owned MATV apartment houses connected by MDS and left no doubt that it did not view the MDS connected MATV systems as cable services. The Com-

[25] *Video International Productions, Inc., supra* at 2 (emphasis added).

[26] *Cable Dallas, Inc.*, 93 FCC 2d 20 (1983).

[27] *See Ortho - O - Vision, Inc.*, 69 FCC 2d 657 (1978), *recon. denied*, 82 FCC 2d 178, 183 (1980), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2nd Cir. 1982). *See also Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

mission distinguished its preemption of the services at issue from its prior decision to relinquish to the state "franchising jurisdiction" over cable. It observed that "cable television, by its very nature, makes significant use of public streets and rights-of-way" and thus the cable precedent did "not in any way qualify [the FCC's] jurisdiction over other forms of interstate communication. . . ."[28] Similarly, when preempting state regulation of a SMATV service in *Earth Satellite Communications, Inc.*[29] ("ESCOM"), the Commission cited the *Cable Dallas* decision as indicative of the types of SMATV systems that could be defined as cable systems. As noted above, the Commission had concluded in *Cable Dallas* that SMATV buildings interconnected by cable are within the Commission definition of a cable system.

21. Based on the foregoing, we believe that the Commission's precedents prior to the Cable Act established principles that: (1) use of wire or cable solely within a building's premises did not trigger jurisdiction over the system as a wire or cable communications service, (2) MATV or SMATV systems contained within a single building were not cable systems, and (3) where two or more multiple unit dwellings were served by MATV or SMATV systems that were connected by radio transmission facilities alone, the systems were not cable systems, even though the several buildings were not commonly owned, controlled, or managed.[30] Since there is no

[28] 82 FCC 2d at 183.

[29] 95 FCC 2d 1223, n. 3 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

[30] Although there are no decisions expressly addressing the status of MATV or SMATV buildings connected by infrared transmissions, we have no reason to conclude that the result would be any different in those circumstances. The Commission's decisions do not suggest that the mere use of wire or cable within SMATV or MATV equipped buildings would be sufficient to qualify systems as "cable"

indication in the Cable Act or its legislative history that the congressional drafters intended to upset these prior principles, we conclude that they should be applied when applying the statutory definition of a "cable system." As previously noted, that definition states that a facility must use a set of "closed transmission paths" in order to be considered a cable system for purposes of the Act. We believe that this language should be interpreted to mean that facilities which use wire solely *within* a building are not "cable" systems under the Act.[31] Stated differently, we conclude that the "closed transmission path" requirement of the statute contemplates that wire or cable must be used outside the premises of MATV and SMATV buildings before the facilities may be deemed a cable system under the statutory definition.

22. Accordingly, single building MATV or SMATV systems will not be considered "cable systems," for purposes of the Cable Act or our rules, since such systems do not use wire outside the building.[32] Under a similar

systems if the internally wired buildings were connected by some types of radio facilities (*e.g.*, infrared) but not others (MDS or satellites).

[31] The House Report's understanding that SMATV systems would not be cable systems "unless such . . . facilities use a public right-of-way" is consistent with these principles, since cable's use of rights-of-way only occurs when cable is used outside a building's premises. H.R. Rep. No. 98-834, 98th Cong., 2d Sess. 44 (1984).

[32] In addition, single-building systems fall squarely within the Cable Act's exemption for private cable systems since they only serve subscribers in a single multiple unit dwelling that is under common control, ownership, or management. The Senate Report on the Senate version of the Act, which contained an identical exemption, stated that it was designed to cover "the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) system." S. Rep. No. 98-67, 98th Cong., 1st Sess. 18-19 (1983). The clear distinction between MATV/SMATV systems and cable systems also is reinforced by the separate reference to SMATV systems as distinct from cable systems in the

analysis, MATV or SMATV buildings interconnected by radio facilities alone also will not be deemed to be "cable systems." By contrast, MATV or SMATV buildings that are connected by wire, cable, or other closed transmission paths will be considered cable systems, unless they fall into the "private cable" exemption set forth in the Cable Act. The scope of that exemption is discussed below.

B. PRIVATE CABLE EXCLUSION

23. Section 602(6) of the Cable Act and Section 76.5 (a) of our rules exclude from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way." Where SMATV and MATV buildings [33] are interconnected by closed transmission paths. Commission precedent and the plain language of the statutory exemption make clear that the services must be considered cable systems unless (1) the buildings are commonly owned, controlled, or managed and (2) the facilities do not use any public rights-of-way.

24. *"Common Ownership, Control, or Management Requirement.* When incorporating the statutory exemption for private cable systems into our rules, we suggested that we would rely solely on whether the facility crossed a public right-of-way.[34] In the *Fargo* decision,

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equal employment opportunity provisions of the Act. See Section 634(h)(1) ("For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system . . . .").

[33] Whether a SMATV or MATV building serves a "multiple unit dwelling" for purposes of the private cable exemption has been fully discussed in prior Commission decisions. *See First Report and Order in Docket 00561*, 63 FCC 2d 956 (1977) and cases cited therein.

[34] Thus, we initially stated that "[w]ith regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable

however, the district court expressly rejected this conclusion, claiming that "it contravenes unambiguous Congressional intent." [35] In the *Notice*, we stated our inclination "to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved." [36]

25. Most commenters concurred with this view. Those who did not [37] interpreted the Act's legislative history to support their argument that Congress intended the use as a public right-of-way to be key to inclusion or exclusion from the definition. In this regard, the House Report on the Cable Act states that the definition exempts "a facility or combination of facilities that serves only subscribers of one or more multiple unit dwelling (in other words, satellite master antenna television system), *unless such facility or facilities use a public right-of-way.*" [38]

26. Notwithstanding the above cited language, we believe that our inclination, as stated in the *Notice*, was correct. Indeed, a contrary interpretation would appear

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systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 50 Fed. Reg. 18637, 58 RR 2d 1, 11 (1985). On reconsideration, we further stated that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-97 (1986).

[35] *City of Fargo v. Prime Time Entertainment, Inc., slip op.* at 9.

[36] 4 FCC Rcd at 2088.

[37] These included Spectradyne, National Satellite Programming Networks et al., American Tele/Lease. PrimeTime 24. Pellegrin & Levine, Pacific West Cable, and Preferred Communications.

[38] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 44 (1984) (emphasis added).

to render the "common ownership, control, or management" portion of the statutory definition superfluous, a violation of the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." [39] Because the plain language of the statute is unambiguous, resort to legislative history is unnecessary.[40] In any event, the "common ownership, control, or management" aspect of the exception has been a part of our definition of a cable system from the beginning [41] and we do not now believe the language added by the Cable Act pertaining to public right-of-way use was intended to expand the types of facilities exempted from coverage of the Act. We conclude, therefore, that in some circumstances where multiple unit dwellings are involved—specifically where cable is used to interconnect individual buildings, the ownership, control, and management of the building is relevant to determining where the system is a cable system.[42]

27. *Public Right-of-Way Use.* In order to qualify for the private cable exemption, a facility not only must serve buildings that are commonly owned, controlled, or

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[39] Kungys v. U.S., 108 S. Ct. 1537, 1550 (1988) (opinion of Scalia, J.).

[40] *See ACLU v. FCC*, 823 F. 2d 1534, 1568-1569 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

[41] *First Report and Order in Docket* Nos. 14895 and 14233, 38 FCC 683 (1965).

[42] This interpretation is also consistent with the Commission's preemption decisions prior to the Cable Act, in which the Commission made clear that state regulation of facilities defined by the Commission as cable systems had not been preempted. For this reason and the reasons stated above, we reject PrimeTime 24's proposal that we interpret the SMATV exception to exclude from the cable system defintion any video distribution service operating exclusively on private property. *See also Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321 (1987).

managed but also must not use any public right-of-way. We therefore sought comment in the *Notice* "with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology." [43] As noted by several parties, the specific statutory language refers to "uses" of a public right-of-way and our use of the term "crossing" was not meant to imply anything different.

28. As discussed above, radio transmissions, including infrared transmissions, do not constitute "closed transmission paths" under the statutory definition of a cable system. Accordingly, such transmissions do not meet even the threshold definitional requirements of a cable facility. In addition, most parties commenting on this issue stated their belief that Congress did not intend to include within the meaning of the term "use" of a public right-of-way the mere passing over of such a right-of-way by electromagnetic radiation. We agree. As articulated by Southwestern Bell Corporation and others, radio waves may cross a public right-of-way but do not use it. We believe it is well established that radio transmissions, including line of sight transmissions, such as the point-to-multipoint transmission used in MDS, do not use public rights-of-way. For example in *New York State Commission on Cable Television v. FCC*, the court stated that "MDS is different from franchised cable in one critical respect: it is operated solely on private property and makes no use of public rights-of-way." [44]

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[43] 4 FCC Rcd at 2088. In light of our conclusion above that infrared, point-to-point microwave, and other radio transmission systems do not constitute "closed transmission paths" we recognize that the consequence of whether such transmissions involve right-of-way use issue is much reduced. Nevertheless, because right-of-way use has constituted an important jurisdictional boundary, *e.g.* Section 621(e) of the Act, we believe the matter continues to warrant discussion.

[44] 749 F.2d 804, 810 (D.C. Cir. 1984). As the Mass Media Bureau explained in *Channel One, Inc.* (letter dated February 25, 1986),

29. This conclusion comports fully with Section 621(e) of the Act, which left unaffected Commission decisions limiting State authority to license or regulate MATV or SMATV type facilities not using any public right-of-way. The House Report states

> Section 621(e) clarifies that this bill does not affect the authority of a state or political subdivision to license or regulate an SMATV system which does not use public right-of-way. Recently the FCC sought to preempt state regulation *Earth Satellite Communications, Inc.* . . . The Committee does not intend anything in this title to affect the FCC's decision, or to affect any view of this decision by the courts.[45]

In both its *Orth-O-Vision*[46] and *Earth Satellite Communications*[47] decisions, the Commission had stated that a central basis for its decision to permit state franchise regulation of cable system was that such systems use of public rights-of-way, whereas preempted, non-cable MATV and SMATV (in which cable is used only within a building's premises) do not.[48] Accordingly, crossing but not "using" a public right-of-way by infrared or radio relay

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the premise that the line-of-sight paths required by infrared and other radio transmission burden and thus use public rights-of-way is "unfounded" because

> [t]he location of the line of sight communications link is selected at the operator's risk, and the community is generally under no obligation to accommodate that selection by forbearing from the installation of potential obstructions that would have been installed irrespective of the communications link.

[45] H.R. Rep. 98-934, 98th Cong., 2d Sess. 63 (1984).

[46] 69 FCC 2d 178 (1980); *recon. denied*, 82 FCC 2d 178 (1980).

[47] 95 FCC 2d 1223 (1983).

[48] *See generally New York State Commission on Cable Television v. FCC*, 749 F.2d at 808-11.

facilities does not change the applicability of the policies reflected in Section 621(e) and in the *Orth-O-Vision* and *Earth Satellite Communications* decisions.

30. Whether a facility uses a right-of-way, of course, remains relevant to whether a multi-building system interconnected by closed transmission paths falls within the private cable exemption. As noted previously, in order to qualify for this exemption, the facility not only must serve multiple unit dwellings that are commonly owned, controlled, or managed, but it also must not use a public right-of-way. If the facility does cross a public right-of-way, it will be considered a cable system for purposes of the Cable Act and our rules.

C. Other Issues Raised by Parties

31. The comments of Spectradyne and the late-filed reply comments of the City of Chicago (which we shall accept in the interest of having a complete record) raise certain issues regarding the status of entities that use common carrier telephone lines to transmit programming to hotels and multiple unit dwellings. These matter are more generally at issue in our pending proceeding relating to telephone-cable cross-ownership,[49] and are not at issue in today's decision.

32. We note, however, that for an operation to be defined as a cable system it must have "subscribers." Although the term "subscriber" is not a defined term in the Cable Act, it is now and was defined at the time of passage of the Cable Act in the Commission's rules as "a member of the general public who receives broadcast programming distributed by a cable television systems and *does not further distribute it.*"[50] Thus, for example, if

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[49] *Notice of Inquiry and Notice of Proposed Rule Making in CC Docket* 87-266, 3 FCC Rcd 5849, 5863-64 (1988).

[50] Section 76.5(ee) (emphasis added).

video service is delivered to hotels for resale by these establishments over internal MATV wiring to lodgers, then that service provider (i.e. the party delivering programming to the hotels) has no "subscribers" as that term is defined in the Commission's rules. Because providing service "to multiple *subscribers* within a community" [47] is a critical element in the statutory definition, such an operation—if it operates as a wholesaler and has no "subscribers" of its own—may not come within the cable system definition. We note, moreover, that hotels are within the exemption for multiple unit dwellings and, as clarified herein, where more than one such multiple unit building is interconnected only by radio transmission or other non-closed transmission facilities (or use closed paths but are commonly owned and have no street crossings), such an entity is not a cable system.[51]

33. The National Cable Television Association suggests in its comments that there are particular cable rules that might well be applied to entities other than cable systems and urges that such matters "can be given a more thorough airing in a discrete proceeding." NCTA and the Community Antenna Television Association also raise an issue concerning signal leakage by non-cable distribution systems, and urge that a separate Rule Making proceeding be undertaken on this question.[52] These matters are beyond the scope of the instant proceeding and will not be addressed here. Should these parties wish to pursue these matters further, they should file a petition for Rule Making in accordance with Section 1.401 of the Commission's Rules.

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[51] Nor are they cable systems if closed transmission paths are used but no right-of-way is involved and the buildings are commonly owned, controlled or managed.

[52] Signal leackage [*sic*] from such operations, it should be noted, is not unregulated. It is, however, covered by Part 15 (radio frequency devices) rather than by Part 76 (cable television) of the rules.

IV. CONCLUSION

34. To resolve significant issues concerning the scope of the statutory term "cable system," we have carefully reviewed in this proceeding the language and legislative history of the Cable Act and the Commission's precedents interpreting the term. As discussed above, we have concluded that facilities must be interconnected by physically closed or shielded transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion. The use of wire or cable exclusively within the premises of multiple unit buildings (MATV and SMATV systems) also does not fall within the statutory definition. Thus, use of radio facilities to connect more than one multiple unit dwelling served by a MATV or SMATV system does not make that system a cable system. However, where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed interconnection paths do not use a public right-of-way. Although these general principles may not resolve every possible issue concerning the scope of the statutory definition, they should provide ample guidance in interpretations of the statutory terms and, in our view, will significantly dispel the confusion that has arisen.

Regulatory Flexibility Act Final Analysis

35. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is [as] follows:

Need for and purpose of the rules.

The Cable Communications Policy Act of 1984 defined what a cable system is for purposes of the Act. In response to two district court decisions, we have read-

dressed our implementation and interpretation of the statutory definition to ensure that we carry out the intent of Congress.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and the changes made as a result.

A. *Issues raised.* No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment.* Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the Notice and considered all the comments directed to the various issues in the *Notice.* After carefully weighing all aspects of this proceeding, the Commission has adopted the interpretation of the term cable system that appears most reasonable under the mandate of the Cable Act.

36. Accordingly, IT IS ORDERED that, pursuant to sections 4(1), 303(r) and 602(6) of the Communications Act, 47 U.S.C. Sections 154(1), 303(r), and 522 (6), the interpretations of the term cable system set forth in this proceeding ARE ADOPTED.

37. IT IS FURTHER ORDERED that the "Motion for leave to file Reply Comments *Nunc Pro Tunc* July 10, 1989" filed August 18, 1989 by the City of Chicago IS GRANTED.

38. IT IS FURTHER ORDERED that the "Motion to Strike" filed August 8, 1989, by the National Satellite Programming Network, *et al.*, IS DENIED.

39. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

List of Commenters

1. American Tele/Lease, Inc.
2. BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
3. Capital Cities/ABC, Inc.
4. Capital Wireless Corporation
5. City of New York
6. Community Antenna Television Association, Inc.
7. George Mason University Foundation, Inc.
8. Hughes Communications Galaxy, Inc.
9. Liberty Cable, Inc.
10. Major League Baseball, National Basketball Association, and National Hockey League.
11. Microband Companies Incorporated
12. National Broadcasting Company, Inc.
13. National Cable Television Association, Inc.
14. National Satellite Programming Network; Beach Communications, Inc.; Casden Cable Company; CMJ Communication; Maxtel Limited Partnership; MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite System Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications, Inc.
15. National Telephone Cooperative Association.
16. Pacific Bell and Nevada Bell
17. Pellegrin & Levine, Chartered
18. PrimeTime 24, Joint Venture
19. Southwestern Bell Corporation
20. Spectradyne, Inc.
21. Todd Integrated Systems, Inc. and Peoples Choice TV, Inc.

22. WH-TV Broadcasting Corporation d/b/a Telecable of Puerto Rico
23. Wireless Cable Association, Inc.

Reply Comments

1. American Tele/Lease, Inc.
2. Association of Independent Television Stations, Inc.
3. Bell South Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
4. Capital Wireless Corporation
5. City of Chicago
6. Cross Country Telecommunications, Inc.
7. George Mason University Foundations, Inc.
8. National Cable Television Association, Inc.
9. National Satellite Programming Network; Beach Communication, Inc.; Casden Cable Company; CMJ Communications; Maxtel Limited Partnership; MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite Systems Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications Inc.
10. Pacific West Cable Company and Preferred Communications, Inc.
11. Pellegrin & Levine, Chartered
12. Todd Integrated Systems, Inc. and People Choice TV, Inc.
13. Wireless Cable Association, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 89-35

IN THE MATTER OF

DEFINITION OF A CABLE TELEVISION SYSTEM

NOTICE OF PROPOSED RULE MAKING

Adopted: February 1, 1989: Released: March 3, 1989

By the Commission:

1. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act)[1] was signed into law, establishing a national policy concerning cable communications "that clarifies the current system of local, state and Federal regulation of cable television."[2] In order to implement provisions of the Act, we adopted certain amendments to Parts 1, 63, and 76 of the Commission's Rules. *Cable Communications Act Rules*, 58 RR 2d 1 (1985) *modified*, 104 FCC 2d 386 (1986), *aff'd in part and rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). The implementation of one of our conforming rule amendments has given rise to certain questions, which lead us to issue this Notice of Proposed Rule Making.

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[1] Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984) (codified principally at 47 U.S.C. Sections 521-639). The Cable Act amends the Communications Act of 1934, as amended, 47 U.S.C. Section 151, by adding, *inter alia*, a new Title VI.

[2] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 19 (1984).

2. The Cable Act defines a cable system as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes basic programming and which is provided to multiple signals within a community." 47 U.S.C. Section 522.51. That same section also excludes from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way. 47 U.S.C. Section 552(6)(B). In adopting our implementing rule we adopted the Act's definition and exclusions including the one noted above, as a conforming rule change. *Cable Communications Act Rules, supra. See also* 47 C.F.R. Section 65(a). In doing so, we stated that "with regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 58 RR 2d at 11. On reconsideration, we further stated that "[w]hen mutiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is upon the crossing of the public rights-of-way, not the ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-397. Recent decisions by two federal district courts, however, have raised significant questions concerning both the Commission's construction of the multiple unit dwelling exception to the cable definition and the application and scope of the basic definition itself.[3]

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[3] While the decisions of the district courts do not settle questions of national communications policy. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 and n.5 (1984), the potential adverse effect of disparate opinions of the district courts on fundamental definitional questions such as those at issue in these cases is significant. Indeed, it was for this reason that the Commission expressly requested referral on primary jurisdiction grounds in

3. Specifically, in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 slip op. (D.N.D. Mar. 28, 1988), the district court found that the delivery by infrared transmissions of video programming to multiple unit dwellings that were not commonly owned, controlled or managed rendered the facilities involved a cable television system within the meaning of Section 522(6) of the Communications Act of 1934, as amended. Because cable systems are required by the Act to obtain a franchise from local authorities and the service provider in this case. Prime Time Entertainment, Inc. (Prime), had not done so, the court concluded that Prime's operations were impermissible. Accordingly, the court enjoined Prime from providing service over its existing facilities until the requisite franchise was obtained. In its decision, the court specifically addressed the applicability to Prime of the multiple unit dwelling exception to the cable definition. It found the exception to be unavailing in the circumstances of the case before it because the units served by Prime were not commonly owned, controlled or managed.[4] In reaching this determination, the court expressly rejected the Commission's interpretation of the Section 522(6)(B) exception, noted above. The court concluded that the Commission's disregard of the

City of Fargo v. Prime Time Entertainment, Inc., No. A3-87-47 slip op. (D.N.D. Mar. 28, 1984) discussed below. The district court, however, denied our request. Accordingly, to avoid these potential adverse effects and to provide certainty and uniformity in this area, we believe this Rule Making proceeding is advisable.

[4] As a result, the court did not reach the question of whether the interconnection of multiple unit dwellings by infrared transmissions constituted a crossing of a public right-of-way. We note, however, that the Mass Media Bureau, in informal opinions issued pursuant to delegated authority, has expressed the rules that the linkage of two SMATV systems by infrared transmissions does not constitute a crossing of a public right-of-way. *See Channel One, Inc.* (letter dated February 25, 1986) and Letter to Mark J. Tauber and Deborah C. Costlow (dated December 19, 1985).

common ownership, control or management aspect of the exception and its exclusive reliance on the crossing of a public right-of-way as dispositive of the exception's applicability was erroneous "because it contravenes unambiguous Congressional intent." [5]

4. Two basic aspects of the *Fargo* decision invite particular attention. First, the court's rejection of our construction of the multiple unit dwelling exception suggests a clear need to revisit this area. After a preliminary review, we are inclined to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved. Commenters are welcome to propose alternative constructions of the statutory exception, but in doing so they should carefully document their supporting arguments. Comments are also sought specifically with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology.

5. Second, the possible implication in the *Fargo* court's decision that Prime's wireless, infrared transmission system might satisfy the basic statutory definition of a cable system as a "set of closed transmission paths and associated signal generation, reception and control equipment was designed to provide cable service" has potentially troubling implications. We are especially concerned that the potential inclusion within the cable definition of a nontraditional delivery system such as infrared extends the definition in a manner that may be inappropriate and inconsistent with congressional intent. This could presage other possibly inapt extensions of the definition that would require the treatment of additional wireless video delivery systems as cable systems as well. Indeed,

[5] *City of Fargo v. Prime Time Entertainment, Inc.*, slip op. at 9.

in a very recent decision, another federal district court apparently concluded that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities constituted a cable television system within the meaning of the Communications Act. *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565 (N.D.Ga. 1988).[6] For purposes of the cable system definition, the service provided by Satellite Broadcast Networks, Inc. (SBN), in that case is difficult to distinguish from the service proposed to be provided by Direct Broadcast Satellite (DBS) systems. DBS, like other analogous services, including the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS), is designed to deliver video programming to multiple subscribers in a community. Yet, it seems clear that Congress did not intend in adopting the Cable Act to include these alternate delivery systems within the statutory definition of a cable system. Several considerations prompt our view in this regard.

6. First, nowhere in the Cable Act or in its legislative history is there an affirmative statement that Congress

[6] The court reached this determination in the context of finding that, under the provisions of the Copyright Act of 1976, 17 U.S.C. Section 101, *et seq.*, *Satellite Broadcasting Networks, Inc.* (SBN), was not entitled to a compulsory license to distribute the broadcast signals it was delivering to homes by satellite. The court detailed two rationales for its finding. First, the court concluded that SBN was ineligible for a compulsory license because only cable systems were entitled to the license and SBN's facilities did *not* meet the definition of a cable system in the Copyright Act. Second, the court noted that, under the Copyright Act, a compulsory license is only available with respect to signals the carriage of which is permissible under the rules of the FCC. The court found that SBN's service did not meet this criterion because SBN *did* constitute a cable system under the definition in the Communications Act and it had not obtained certain service authorizations required of cable systems.

meant to define a cable system so broadly as to incorporate such services as MDS, MMDS, DBS or Satellite Master Antenna Television (SMATV). This omission is significant since such a broad definition of a cable system represents a dramatic departure from longstanding and consistent Commission practice in regulating cable television service. Ordinarily, such a radical change would be expected to prompt specific congressional comment, particularly since Congress was plainly aware of the discrete nature of the alternative video service involved when it adopted the statutory definition and appeared to anticipate their being subject to a different form of regulation than cable.[7] Second, the statutory scheme adopted in the Cable Act is, in many fundamental respects, entirely inappropriate for such alternative services as MDS and DBS Local franchising requirements, for example, are completely incompatible with the national service characteristics of a DBS system.[8] Finally,

[7] Until 1977, the Commission expressly defined a cable system as a facility that delivered service by "wire or cable," thereby limiting the defintion to traditional cable systems and excluding wireless technologies. *See Cable Television Report and Order and Consideration*, 36 FCC 2d 1, 74 (1972) (former Section 76.5(a) of the rules adopted therein). In 1977, the Commission revised the definition by substituting the term "a set of transmission paths" for "wire or cable." In doing so, however, the Commission specifically noted its intent that the new defintion "not be interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ." *First Report and Order* in Docket No. 20561, 63 FCC 2d 956, 966 (1977). This definition remained in effect, without relevant change, until adoption of the Cable Act in 1984.

[8] For example in reviewing recent developments in the home video industry the Report of the House Committee on Energy and Commerce accompanying H.R. 4103 (the House version of the Cable Act) noted that "[n]ew forms of competition to cable were initiated or began to show promise of emerging during this period. These include the SMATV industry, multi-channel MDS Direct Broadcast Satellite

we believe the language of the definition itself—particularly the requirement that a cable system consist of a "set of closed transmission paths"—contemplates excluding delivery systems that exclusively or primarily utilize "radiating" technology to deliver service to end users.

7. In view of the foregoing analysis we seek comment concerning the proper scope and application of the cable system definition contained in Section 522(6) of the Act and whether, and in what manner, we should amend our rules or existing interpretations of our rules to properly reflect the statutory definition. We are particularly concerned that delivery systems apparently not intended to be included within the definition—such as SMATV, DBS, MDS, MMDS and leased uses of Instructional Television Fixed Service (ITFS) channels—not fall within the ambit of any interpretation or definition we may eventually adopt. In this connection, we specifically request that commenters address whether existing language in the definition—for example, the requirement that a cable system be comprised of a "set of closed transmission paths"—adequately distinguishes traditional cable systems from alternative video delivery services.

(DBS), subscription television, and the expansion in home video cassette recorders." H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 22. Indeed, the House Report directly reflects Congressional awareness of the regulators distinctiveness of cable in expressing its concern for competitive insurance among the different video delivery systems. In this connector, the House Report stated

> In adopting this legislation, the Committee is concerned that federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of alternative delivery systems for there services, such as DBS, SMATV and subscription television. The public interest is served by this competition and it should continue.

Id. at 22, 23.

REGULATORY FLEXIBILITY ACT
INITIAL ANALYSIS

8. *Reason for action.* This action is taken to implement certain provisions of the Cable Communications Policy Act of 1984.

9. *Legal basis.* Authority for action as proposed for this Rule Making is contained in Section 4(i) and Section 303 of the Communications Act of 1934, as amended.

10. *Description, potential impact and number of small entities affected.* The Commission seeks comment in this proceeding on two basic issues related to the definition of a cable television system in the Communications Act. First, noting the decision in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 (D.N.D. Mar. 28, 1988), in which the district court found the Commission's broad construction of the multiple unit dwelling exception to the cable definition to be erroneous, the Commission invites comment on the appropriate interpretation of the exception. In this regard, the Commission expressed its preliminary concurrence in the court's opinion. Under the court's view of the exception, a facility otherwise qualified as a cable system under the basic definition would be excluded from the definition only if it both (a) exclusively serves multiple unit dwellings under common ownership, management or control and (b) the facility does not cross any public right-of-way. If this view is ultimatey adopted by the Commission, some small entities might be considered cable television systems that were previously deemed exempt. This reclassification could result in substantial burdens for the affected entities, including a requirement that a franchise be obtained and adherence to Commission rule and statutory requirements for cable systems. Second, the Commission notes its concern that the *Fargo* decision could be read to imply that a video delivery system that used primarily a technology other than wire or cable in providing its services could nonetheless be a cable system

under the Communications Act. The Commission questions whether such a broad interpretation of the definition—and that of a second district court which found the direct-to-home delivery of broadcast signals via satellite to constitute a cable system—are consistent with the statutory language in the Act and congressional intent underlying that language. Accordingly, the Commission invites comment on the appropriate scope and application of the basic cable definition. Adoption of the broad view of the definition could result in certain entities not now deemed to be cable systems, including DBS, MDS, MMDS and SMATV systems, being considered cable systems. As already noted in connection with the scope of the exception to the definition, this would result in the application of various regulatory and statutory requirements to these systems, and the imposition of corresponding burdens, which have not been heretofore applied.

11. *Recording, record keeping and other compliance requirements.* None.

12. *Federal rules which overlap, duplicate or conflict with this rule.* None.

11. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives by the Act.* None.

PAPERWORK REDUCTION ACT IMPLICATIONS

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens upon the public.

PROCEDURAL MATTERS

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See Generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates Section 1.1206.

17. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file com-

ments on or before May 2, 1989 and reply comments on or before June 1, 1989. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

18. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initail regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Section 601 *et seq.* (1981)).

19. In accordance with the provision of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission Dockets Reference Room (Room 239) at its headquarter in Washington, D.C. (1919 M Street, N.W.).

20. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Mass Media Bureau (202) 632-7480.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] We also note that the dual federal-local jurisdictional approach to regulating cable television service—a central component of the statutory scheme—is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction and use of public rights of way in the communities they serve. Yet these distinctive traits are absent in the alternative delivery systems.

SUPREME COURT OF THE UNITED STATES

No. 92-603

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed November 30, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

November 30, 1992

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